FILED
DEC 21 1923
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 268.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,
Petitioner and Defendant in Error,
vs.
O. J. Nichols,
Plaintiff in Error.

Reply Brief of ~~Plaintiff in Error.~~ Respondent

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Reply Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

The plaintiff in error, O. J. Nichols, is a resident of the state of California. The defendant in error, Atchison, Topeka and Santa Fe Railway Company, is a citizen of the state of Kansas. The complaint in this action was originally filed in the Superior Court of the county of Los Angeles, state of California. The defendant duly appeared therein and filed its petition for removal of said action to the District Court of the United States for the Southern District of California. The plaintiff in his complaint seeks to recover damages for the death of his

wife, a passenger with himself on one of the defendant's east bound trains in the state of New Mexico. The particulars concerning the death of the plaintiff's wife and the negligence of the defendant causing the same are fully set forth in the complaint.

A jury trial was, in writing, expressly waived by the parties and the cause was tried by the court without a jury. The court made and filed its findings in favor of the plaintiff upon all of the allegations of fact alleged in the complaint, except the court found the plaintiff's damages to be the sum of $5,000.00 instead of a greater sum alleged in the complaint [Tr. p. 48]; however, the court's conclusions of law were to the effect that plaintiff could not recover the damages so suffered and judgment was accordingly entered in favor of the defendant.

The decision of the Circuit Court of Appeals reversed the judgment of the District Court and ordered judgment on the findings in favor of plaintiff in error for the sum of five thousand dollars.

The statute involved in this action, and construed in the decision of the Circuit Court of Appeals, was originally adopted as section 1820 of the New Mexico Annotated Statutes of 1915. It is referred to in the Compiled Laws of New Mexico of 1884 as section 2308 and in a later edition as section 3212. It reads as follows:

"Whenever any person shall die from any injury resulting from, or occasioned by, the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee, whilst running, conducting, or managing any locomotive, car or train of cars, or of any driver of any stage coach or other public conveyance, whilst in charge of the same as driver, and when any passenger shall die from any injury resulting from, or occasioned by, any defect or insufficiency in any railroad, or any part thereof, or in any locomotive, or in any stage-coach or other public conveyance, the corporation, individual, or individuals in whose employ any such officer, agent, servant, employee, engineer, or driver shall be at the time such injury was committed, or who owns any such railroad, locomotive car, stage-coach, or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay, for every person or passenger so dying, the sum of five thousand dollars, which may be sued for and recovered, FIRST, by the husband or wife of the deceased; or, SECOND, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or THIRD, if such deceased be a minor, and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant or his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency."

We shall throughout this brief refer to the quoted section as section 1820.

Foreword.

As preliminary to the argument in this case, we suggest the following:

No state policy, in our opinion, requires the courts of one jurisdiction to accord to the courts of a state where the law gives the right, a superior ability to their own to try the facts and render the judgment, and no sound state policy will deny to the citizens of a state the right to try their cases therein, or require them to travel several thousands of miles—perhaps over the road of an offending defendant in error—to obtain relief where the service of process may be made within the jurisdiction.

If this contention is sound, then wherein does the judgment of a state have a superior right of enforcement over the law of such state in its transit into judgment in another state. Surely it must be admitted that the sovereign right of pronouncing a judicial judgment is as great in one state as it is in another, and section 1 of article IV of the Constitution of the United States seems to give sanction to this position.

The fact that the law of one state is different from the law of another state by no means in-

dicates that the enforcement of the law of the one state is contrary to the policy of the other.

BRIEF OF THE ARGUMENT.

I.

The right of action of plaintiff in error rests upon section 1820 of the laws of New Mexico, and the cause of action is not contrary to any established policy or declared law of California. The enforcement of the right is authorized by decision of the Supreme Court of California. Also, federal courts enforce such right as a matter of general law.

Ryan v. North Alaska Salmon Co., 153 Cal. 439;

Huntington v. Attrill, 146 U. S. 657-686;

Northern Pacific Railway Co. v. Babcock, 154 U. S. 190-193;

Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593;

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Boston & M. R. R. v. Hurd, 108 Fed. 116;

Lauria v. E. I. Dupont DeNemours & Co., 241 Fed. 687;

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Whitlow v. Nashville, Chattanooga & St. Louis Ry. Co., 68 L. R. A., 503-509;

Hill v. Boston, etc., 77 N. H. 151, 89 Atl. 482;

Morisette v. Canadian Pacific Ry. Co., 56 Atl. 1102.

II.

Defendant in error is not entitled to raise any question concerning the policy of the state of California because it is not a citizen of that state.

Held v. Dist. of Columbia, U. S. Supreme Court, Advance Opinions #15 of date June 15, 1922, p. 503;

Minor on Conflict of Laws, Section 5, pp. 9-10; Section 7, pp. 12 13; Section 8, p. 16.

III.

The right of plaintiff in error to enforce his cause of action arising under the law of New Mexico is guaranteed by article IV, section 1 of the Constitution of the United States

Kenney v. Supreme Lodge of the World, Loyal Order of Moose, 252 U. S. 411-416;

Tennessee Coal I. & R. Co. v. George, 233 U. S. 354-361;

Atchison, Topeka & S. Fe Ry. Co v. Sowers, 213 U. S. 55-71.

ARGUMENT.

I.

Plaintiff in Error Having Become Vested With a Right of Action Under the Law of the State of New Mexico, May Enforce Such Right Within the State of California.

With full knowledge of the character of the statutes of New Mexico, the defendant in error, by its initial pleadings herein, unamended throughout the litigation, elected the particular New Mexico statute upon which it would rely to defeat the action, and that statute was not the so-called "penal" statute (section 1820) of the statutes of New Mexico, but was section 1821 of the statutes of that state, relating to damages in general for death (being other than for the death of a passenger on a railroad), which statute provides for compensatory damages agreeable to the law of California and also for exemplary damages which may be disregarded. This section 1821 is set forth in the demurrer of defendant in error [Tr. pp. 25-29].

In its demurrer, under sub-section 4 of said section 1821, defendant in error contends that the action should be prosecuted only by the personal representatives of the deceased, and by paragraph 8 of its answer, it pleads the legal effect thereof as an affirmative defense [Tr. pp. 37-88].

Having thus taken the position that the action could be defeated for the want of a plaintiff in the person of a personal representative as required by said section 1821, and having carefully ignored section 1820 which provides for the prosecution of the action by a surviving spouse—the plaintiff in this case—it would seem as though defendant in error had restrained itself by the rule of estoppel from raising any question arising under the unpleaded statute, section 1820, claimed to be contrary to the policy of California. Of course, there is no question but that Federal courts take judicial notice of the laws of each state without their being pleaded and make application thereof, but we do not comprehend how such judicial notice can permit a party to plead one statute of New Mexico agreeable to the law of California, and at the same time claim another statute of New Mexico, penal in form, to be contrary to the law of California and for that reason, a bar to the remedy.

Defendant in error, having presented its brief solely with reference to the legal effect of section 1820 of the statutes of New Mexico, we must necessarily meet that issue as presented and do so as follows:

The contention of the defendant in error that a right of action arising under the law of New

Mexico is not enforceable in California, grows out of a mistaken notion that there is an attempt to engraft upon the law of California, the law of New Mexico. This narrow and unsound view is in substance, the doctrine of the small group of cases cited by defendant in error beginning with Dale v. Atchison T. & S. F. Ry. Co., 57 Kan. 501, 47 Pac. 521 and ending with Raisor v. R. R. Co., 215 Ill. 47, 74 N. E. 69. These decisions fail to consider the fact that there is a distinction between the assertion of a right in one state which a litigant has acquired and owns by reason of the law of another state and the making of the law of such other state, the law of the forum. It would indeed be a strange doctrine that would permit a defendant who has incurred a liability in one state under the laws thereof to escape that liability by moving to another state where a different law may prevail with reference to the subject of the litigation, and yet the doctrine contended for by defendant in error and the decisions relied upon by it would make such result possible. Personal service could not be made upon the fugitive defendant in the state where the law and facts give the right and the action could not be enforced in the jurisdiction in which the fleeing party had taken refuge because the law thereof differed from the law of the *lex loci*.

Furthermore, the contention of the defendant in error based upon the decisions cited by it, misconceives the meaning and extent of the phrase "policy of the state" or "policy of the law of the forum" and similar expressions. This Honorable Court in the case of Northern Pacific Ry. Co. v. Babcock, 154 U. S. pp. 190-193, defines what such policy is in a portion of the decision therein quoted from Herrick v. Minneapolis & St. L. R. Co., 31 Minn. 11, the quotation appearing at page 198 as follows:

> "To justify a court in refusing to enforce a right of action which accrued under the law of another state, *because against the policy of our laws*, it must appear that it is against good morals or natural justice, or that, for some other reason, the enforcement of it would be prejudicial to the general interest of our own citizens."

We understand from such language that unless the right to be enforced under the law of another state is against good morals or natural justice or is prejudicial to the general interests of the citizens of the state where its enforcement is sought, there is no violation of the policy of the state, or in other words, that no such policy in reference to rights arising therein is considered as invaded unless in the manner indicated.

The Federal and state cases upon which the plaintiff in error in the case at bar relies, give a consideration and weight to the ownership of a right acquired in one state and the enforcement thereof in another state which is wholly lacking in the cases cited by the defendant in error.

We can see no distinction in the universally accepted principle of law that a contract for the payment of interest which is valid in the state where made, is enforceable in another state, even though it would be violative of the usury law of such state, if made therein, and the right of a litigant who has sustained damages in and under the law of one state to recover the same in another state, although the law of the *lex loci* may differ from the law of the forum. The plaintiff in error is a citizen of California, seeking in his own state to enforce an obligation against the defendant in error, which as shown by the record in this case, is a citizen of Kansas. The decisions generally hold as we shall hereinafter more particularly point out, that the doctrine known as "the policy of a state" is intended for the benefit of the citizens of the state to which the policy is applied. The defendant in error, therefore, not being a citizen of California, is not entitled to urge the objection made by it to the detriment of a citizen of California, or otherwise.

The decision of the Circuit Court of Appeals in the case at bar considered the question and decided that it is not against the policy of the state of California to enforce a right in that state arising under the New Mexico statute, as shown by the following excerpts therefrom:

> "(1) The law of the case, as we understand it, is this: The defendant in error having removed the action from the court of the state in which it was brought on the sole ground of diversity of citizenship, this court must hold the case governed by the rule that would have controlled it had it not been so removed. It was so held in effect by this court in the case of Northern Pacific Railway Co. v. Kempton, 138 Fed. 992, 998, 999, 71 C. C. A. 246. See also, Spokane & I. E. R. R. v. Whitley, 237 U. S. 487, 35 Sup. Ct. 655, 50 L. Ed. 1060, L. R. A. 1915F, 736, and cases there cited.
>
> (2) It is not contended that the cause of action of the plaintiff in error was given by the common law, but by a statute of the state where the accident to and the death of his wife occurred, which statute reads as follows: * * *"
>
> "(3) The defendant in error contends—and such was evidently the theory upon which the judgment of the court below rested—that the policy of the above statute is so opposed to the policy of the state of California that no court of that state would enforce it. If the statute can be properly held to be a penal one, that is undoubtedly true. It was said by the Supreme Court, speaking through Chief Justice Marshall in

> The Antelope, 10 Wheat. 66, 123, 6 L. Ed. 268:
>
> 'The courts of no country execute the penal laws of another.'
>
> No more do the courts of any state of the United States execute the penal laws of another state. Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. But a penal law is one thing, and a statute intended to protect life and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, is quite another. The latter is a question of general law. Huntington v. Attrill, *supra;* Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439; Texas & Pacific Railway Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. In Huntington v. Attrill the Supreme Court said (146 U. S. at pages 673 *et seq.*, 13 Sup. Ct. at page 230 (36 L. Ed. 1123)):" * * * 286 Fed. page 3. Nichols v. A. T. & S. F. Ry. Co., 218 Fed. pp. 2-3.

In the case of Ryan v. North Alaska Salmon Co., 153 Cal. 439, the Supreme Court of California gave judicial sanction to the enforcement of an action for damages based upon a foreign statute. At page 439 the court said:

> "The demurrer was properly sustained. Where the action, as here, is transitory in its nature, a right or liability imposed by the statute of another state, or of the United States, may in proper cases be asserted and enforced in this state. Such

> may be taken to be the settled rule since the case of Dennick v. Railway, 103 U. S. 11. But the courts of this state will only entertain such an action for the purpose and upon the terms permitted by the *lex loci*. In other words, the right to prosecute this action in California is permissible only if permissible under the laws of Alaska, and only upon such terms as the laws of Alaska prescribe. And, as at common law, there was no right of action for an injury causing death, and as the courts of this state do not take judicial notice of the laws of foreign states, it is necessary for the plaintiff to plead and prove such law."
>
> 153 Cal. 439.

The case of McManus v. Red Salmon Canning Company, 37 Cal. App. 133, cited by counsel for petitioner and defendant in error, does not establish the law of the state of California; the District Court of Appeal is an intermediate appellate court. There are five such courts in California, rendering at times conflicting decisions. The lack of finality of the decisions of these courts has been decreed by the Supreme Court of California in the case entitled People v. Davis, 147 Cal. 350, and this Honorable Court has, as we understand it, decided that such intermediate courts are not courts of last resort. (Stratton v. Stratton, 239 U. S. p. 55.) It is worthy of note that two of the three judges rendering the decision in McManus v.

Red Salmon Canning Company were sitting as judges pro tem.

The decision in McManus v. Red Salmon Canning Company does not, however, decide what the law of California is with reference to the enforcement of the law of another state if contrary to the alleged policy of California. The decision rested upon the ground that the section of the Alaska statute claimed to contravene the policy of California, had been repealed and superceded by the law of 1913, which the court held did in fact give a right of action in California to the plaintiff McManus. Furthermore, the point urged against the alleged obnoxious Alaska statute was not the one urged in the case at bar, but was based upon the ground that the Alaska statute permitted damages recovered for the death of a person to go to the creditors, whereas the California statute created the cause of action for the benefit of the relatives of the decedent, who have a right to look to him for aid and support, based upon their pecuniary loss, the pith of the decision being stated at page 137-138 as follows:

> "Therefore, if appellant's right of action rested on section 1185 alone, we would be compelled to hold that the action could not be maintained, for it would not be in accord with the policy of our laws to make a resident of our state pay damages for

> the death of decedent where no one was shown to have suffered any pecuniary loss thereby. But the second statute pleaded, chapter 45 of the Session Laws of Alaska for 1913, which is a later enactment than section 1185, presents the matter in an entirely different light. Section 1 of that act gives the right of action against the employer for wrongful death of an employee to his personal representative 'for the benefit of his widow and children, if any, if none for his parents, if none then for his next of kin *dependent* upon him,' and section 4 provides that the action shall not be maintained unless it be shown that there are beneficiaries such as are described in the clause just quoted. We are satisfied that this act in effect repeals the provisions of section 1185 in so far as cases between employer and employee are concerned, and provides a remedy for the wrongful death of an employee which is in full accord with the spirit of our law."

Since the decision of this Honorable Court in Dennick v. Central R. R. Co., 103 U. S. pp. 11-21, the courts have uniformly held that a personal action acquired by a person in one state is transitory in its nature and may be enforced in any other state. At pages 17-18 this Honorable Court says:

> "It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the state where the offense was committed, for it is, though a statutory remedy, a

civil action to recover damages for a civil injury.

It is, indeed, a right dependent solely on the statute of the state, but when the act is done for which the law says the person shall be liable and the action, by which the remedy is to be enforced, is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

It is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it is in any manner dependent on the question whether it is a statutory right or a common law right.

Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial, and the local court in New York, and the Circuit Court of the United States for the Northern District, were competent to try a case when the parties were properly before it. See Mostyn v. Fabrigas, 1 Cowp. 161; Rafael v. Verelst, 2 W. Bl. 983; McKenna v. Fisk, 1 How. 241. We do not see how the fact that it was a statutory right can vary the principle. If the defendant was legally liable by going to

> New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her Civil Code. Can these rights be enforced or the wrongs of her citizens be redressed in no other state of the Union? The contrary has been held in many cases." See *ex parte* Van Riper, 20 Wend. 614; Lowry v. Inman, 46 N. Y. 119; Pickering v. Fisk, 6 Vt. 102; R. R. Co. v. Sprayberry, 8 Bax. (Tenn.) 341; R. R. Co. v. Miller, 19 Mich. 305.
>
> 103 U. S. pp. 17-18.

The contention of the defendant in error that the so-called penal statute of New Mexico is contrary to the policy of California and therefore unenforceable in that state, is but a change in form of the objection made to the effect that a penal statute is not enforceable in jurisdictions other than the state of its creation. In all of the cases, so far as we have been able to ascertain, that have come before either the federal or state courts involving the question of so-called

penal statutes, the objection urged has included the point that the law of the place differed materially from the law of the forum.

In the leading case upon the subject, Huntington v. Attrill, 146 U. S. pp. 657, 686, quoted in part in the opinion of the Circuit Court of Appeals in the case at bar, 286 Fed. p. 1 [Tr. pp. 67, 75] this Honorable Court had under consideration a statute of the state of New York making each director of a corporation signing a certificate or false report concerning the affairs of the corporation liable for all of the corporation's debts. In that case judgment had been rendered in favor of Collis P. Huntington for $100,000 against one Attrill, by virtue of the statute mentioned. Enforcement of such judgment was thereafter sought in the state of Maryland by a creditor's bill in equity to set aside the transfer of stock by said Attrill to his wife and daughters. The Court of Appeals of Maryland held that the judgment was not enforceable in Maryland by reason of the penal character of the statute upon which it was founded, the decision making special reference, among other things, to the fact that the liability was not limited to the amount of the creditor's loss.

This Honorable Court in stating the issue involved, at page 664, said:

"The ground most prominently brought forward and most fully discussed in the opinion of the majority of the court, delivered by Judge Bryan, was that the liability imposed by section 21 of the statute of New York upon officers of a corporation, making a false certificate of its condition, was for all its debts, without inquiring whether a creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, and without limiting the recovery to the amount of loss sustained and was intended as a punishment for doing any of the forbidden acts, and was, therefore, in view of the decisions in that state and in Maryland, a penalty which could not be enforced in the state of Maryland; and that the judgment obtained in New York for this penalty, while it 'merged the original cause of action so that a suit cannot be again maintained upon it' and 'is also conclusive evidence of its existence in the form and under the circumstances stated in the pleadings,' yet did not change the nature of the transaction, but, within the decision of this court in Wisconsin v. Pelican Ins. Co., 127 U. S. 265, was in its 'essential nature and real foundation' the same as the original cause of action, and therefore a suit could not be maintained upon such a judgment beyond the limits of the state in which it was rendered."

At page 673 the court said:

"The question whether a statute of one state, which in some aspects may be called

penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in Dennick v. Railroad Co., 103 U. S. 11."

At page 683 the court said:

"In this view that the question is not one of local but of international law, we fully concur. The test is not by what name the statute is called by the Legislature or the courts of the state in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.

In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. Burgess v. Seligman, 107 U. S. 20, 33; Texas & Pacific Railway v. Cox, 145 U. S. 593, 605, above cited."

Huntington v. Attrill, 146 U. S., p. 683.

The decision in Huntington v. Attrill reversed the judgment of the Court of Appeals of Mary-

land, holding the New York statute remedial of private rights, and, therefore, enforcible in Maryland. That decision is the foundation of numerous decisions in the federal and state courts upholding the right to maintain actions for death arising upon state statutes differing materially from the law of the forum, among which may be mentioned the following:

Northern Pac. Railway Co. v. Babcock, 154 U. S. 190-193;

Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593;

Stewart v. Railway Co., 168 U. S. 445;

Boston & M. R. R. v. Hurd, 108 Fed. 116;

Lauria v. E. I. Dupont DeNemours & Co., 241 Fed. 687;

Weissengoff v. Davis, 260 Fed. 17, (C. C. A. 4th Dis.);

Whitlow v. Nashville, Chattanooga & St. Louis Ry. Co., 68 L. R. A., pp. 503-509;

Hill v. Boston, etc., 77 N. H. 151, 89 Atl. 482;

Morissette v. Canadian Pac. Ry. Co., (Vt.), 56 Atl. 1102.

Other cases involving the same point where the injuries did not result in death are:

Atchison, Topeka & S. Fe Ry. Co. v. Sowers, 213 U. S. pp. 55-71;

Tennessee Coal I. & R. Co. v. George, 233 U. S., pp. 354-361.

A case in which a statute of Massachusetts similar to the New Mexico statute, is that of Boston & M. R. R. v. Hurd, 108 Fed. 116, decided by the Circuit Court of Appeals of the First Circuit. The suit was instituted in the Circuit Court of New Hampshire by the administrator of Alice Hurd, who, while a passenger of the Boston & M. R. R., was killed in the state of Massachusetts. The statute of Massachusetts as it existed at the time the cause of action arose, provided a maximum penalty of $5000 and a minimum penalty of $500 for the death of a passenger, without any guide by which the jury was to determine where the fine should rest as between the extremes named. We quote excerpts from the decision as follows:

> "The most important one we have to deal with is whether the Massachusetts statute is strictly penal. It is not sufficient that it is in the nature of a penal statute. The distinction between a statute strictly penal, or *qui tam*, and one in the nature of a penal statute, is pointed out in Huntington

v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. The proper test is that, if it is strictly penal, the remedy is subject to the control of the executive of the state by which the proceeding was authorized, and it may be at any time, either before or after judgment, annulled by a pardon. That its essential nature in this respect is not changed by a judgment was determined in Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239." (P. 119.)

"It is settled that the mere fact that the proceeding is by indictment does not necessarily determine its intrinsic purpose; yet, if the statute stopped there, it would seem impossible that there could be any proceedings in any other state than that where it was enacted. When a state sees fit to interpose its grand jury, and makes that an essential part of the proceeding, it is difficult to perceive how any other state could substitute other process therefor. In the case on which subsequent cases have been built up, Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439, which held that an administrator appointed under the laws of New York might bring an action for death arising under the statutes of New Jersey, the court was careful to rely on the fact that the right of action was not limited by the statutes of New Jersey to the personal representatives of the deceased appointed in that state; but this rule is not broad enough to reach a case where an indictment is required. In Stewart v. Railroad Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, it was held that an action might be brought in the District of Columbia by an admin-

istrator there appointed, the action being based on a statute of Maryland giving damages arising out of a death, although the statute directed that suit should be brought in the name of the state. The statute, however, gave an action strictly civil, and for damages suffered by the relatives for whose benefit the suit was brought; and the Supreme Court held that, as the state was only a nominal party, the question of who should be plaintiff was not a substantial one. The opinion, however, reaffirmed the rule stated in Pollard v. Bailey, 20 Wall. 520, 22 L. Ed. 376, and in Bank v. Franklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825, that where a statutory remedy is given, and the suit is brought in another state than that which enacted the statute, all its substantial terms must be obeyed." (Pp. 119-120.)

"There can be no question that the court regards statutes of this class as remedial, notwithstanding their form, and even when the proceedings must be by indictment. The effect of the weight which the supreme judicial court of Massachusetts gave this case by its method of referring to it tends to a like result in that state. We may add that Shear. & R. Neg. (5th Ed.) paragraph 132, regards the statute in question here as strictly penal. Notwithstanding this, we on the whole conclude that its substantial purpose is remedial. If it still stood as originally framed, and so permitted no form of proceeding except by indictment, we might find difficulty in giving it effect except in the courts of Massachusetts; but the civil remedy, given in the alternative, as we have shown, is a flexible one, and, although the declaration was finally based

> on the Massachusetts statute, it leaves this case within the jurisdiction of the United States Circuit Court in the district of New Hampshire."
>
> Boston & M. R. R. v. Hurd, 108 Fed. 116-12, pp. 122-123.

In the case of Northern Pacific Railway Co. v. Babcock, 154 U. S. 190-203, this Honorable Court referred to Huntington v. Attrill as authority in upholding the judgment of the Supreme Court of Minnesota. The action was brought by an administrator in Minnesota to recover $25,000 damages for the killing of one Munro on the Northern Pacific Railway in the territory of Montana. The law of the territory of Montana provides that where the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may recover such damages as under all the circumstances of the case may be just; the laws of Minnesota, in force at the time of the death, was limited to $5,000. There was a verdict and judgment in favor of the plaintiff for $10,000. The opinion of the court sustained the judgment, holding that the right to recover was governed by the *lex loci* and not by the *lex fori*. At pages 197-198 the court quotes approvingly from Herrick v. Minneapolis & St. L. R. Co., 47 Am. Rep. 771, as follows:

"'The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the *right of action;* while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto.*'"

The opinion continues:

"The defendant admits the general rule to be as thus stated, but contends that as to statutory actions like the present, it is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the righ of action accrued must concur in holding that the act done negatives a right of action. We admit that some text-writers—notably, Rorer on Interstate Law—seem to lay down this rule, but the authorities cited generally fail to sustain it.

But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where

made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens. * * *

The contract of employment was made in Montana, and the accident occurred in that state, while the suit was brought in Minnesota. We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*."

154 U. S., pp. 197-198.

In the case of Illinois Cent. R. Co. v. Ihlenberg, 75 Fed. 873, a decision of the Circuit Court of Appeals, written by Judge Taft, now Justice Taft, the court had under consideration the question of the right of a person injured in the state of Mississippi to prosecute an action for damages therefor in the state of Tennessee; the Constitution of Mississippi making a defendant liable for an injury caused by defective machinery, unless the injury was due to the recklessness of the employee; the law of Tennessee

providing that knowledge by the defendant of a defect in the machinery causing the injury, is a defense to an action therefor against the employer. At page 879 it is said:

> "The only remaining question for discussion is whether a federal court in Tennessee will enforce the Mississippi Constitution with respect to the tort committed in that state. It is well settled by the decisions of the federal courts that, 'While it is true that the statutes of a state have in themselves no extraterritorial force, yet rights acquired under them are alwayse enforced by comity in the state and national courts in other states, unless they are opposed to the public policy or laws of the forum.' "

The Circuit Court of Appeals for the Fourth Circuit in the case of Weissengoff v. Davis, 260 Fed. at page 17, had under consideration a demurrer to the jurisdiction of the U. S. District Court of the state of Maryland to try a case and recover damages for the killing of a sheriff in West Virginia. In holding in favor of such jurisdiction, the court said:

> "A demurrer to the jurisdiction was overruled and the jury found a verdict of $10,000 for the plaintiff. In support of the demurrer to the jurisdiction defendant relies on Ash. v. B. & R. R. Co., 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461, holding that the statute of West Virginia conferring a right of action for wrongful death is not enforceable in the court of Maryland,

> the Maryland statute on the subject being similar, but not identical. That case was decided in 1876, and it does not seem that the court of Maryland has been called on since to review the question. But it is now settled beyond debate by the Supreme Court of the United States that, when the statute of one state takes away the common-law obstacle to a recovery for an admitted tort, an action for the tort committed in that state may be maintained in any state where the statute of the state in which the cause of action arose is not in substance inconsistent with the statute or public policy of the state in which the right is sought to be enforced. The question is one of general law, and the decisions of the Supreme Court are binding in this court. Dennick v. R. R. Co., 103 U. S. 11, 26 L. Ed. 439; Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. * * *"

Weissengoff v. Davis, 260 Fed. 17.

Another and important case following the doctrine announced in Huntington v. Attrill is Laura v. E. I. Du Pont De Nemours & Co., decided by Judge Veeder of the District Court, E. D. New York, 241 Fed. 687, the decision being to the effect that it is unnecessary to find a similar law in the forum to that of the *lex loci*, and that the damages sought were not of that penal character unenforceable in another state. At page 690 the court says:

"I do not concede, however, the validity of the assumption that the exercise of jurisdiction in such cases is dependent upon the existence in the forum of a statute similar to the foreign statute under which the right of action arose. The general rule is that actions for personal torts are transitory in their nature and may be brought wherever jurisdiction of the wrongdoer can be obtained. Wherever such a right of action has become fixed and legal liability incurred, whether at common law or under a statute, it will be enforced in another state unless there is a good reason for refusing to enforce it. If statutory, it will be enforced, not because of the existence of the statute, which of course does not extend *ex proprio vigore* beyond the boundaries of the state in which it is enacted but because it is a right which the plaintiff legitimately acquired and which still belongs to him. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation which, like other obligations, follows the person, and may be enforced wherever the person may be found."

Again at pages 694 and 695 the court says:

"In applying the foregoing principles to the right of action given by the Virginia statute, it must not be overlooked that in federal courts the issue is one of general jurisprudence, upon which the state decisions are not conclusive. * * * In view of Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, there can be no claim that the action is penal. No diffi-

culty in applying it is suggested. It is not unreasonable; nor is it asserted that its enforcement would injuriously affect any general interest of the people of this state. The differences to which attention was called at the outset are claimed, however, to contravene the public policy of this state. Whatever latitude may be permissible in state courts in refusing jurisdiction on grounds of local policy, the rule laid down for federal courts by the Supreme Court in Huntington v. Attrill and other cases above cited seems to leave no room for mere questions of comity, save as they may be involved in the underlying principles of jurisprudence. Greaves v. Neal (C. C.), 57 Fed. 816.

"The facts that the jury may apportion the damages among the beneficiaries, and that the beneficiaries may not in every case be the same under each statute, do not warrant rejection on that ground. Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. Nor does the fact that the Virginia Statute allows elements of damage which are not recognized under the New York statute."

Further support of the validity of the statute in question is given by the case of Mo. Pac. Co. v. Humes, 115 U. S. 512, 29 L. Ed. 463. The opinion is by Justice Field, the question involved being whether double damages afforded by the state of Missouri for the killing of livestock where the railroad company had failed to fence its road, as required by an act of the Legislature, was in violation of the "due process" and

"equal protection of the laws" provisions of the Federal Constitution. At page 466 L. Ed. the court said:

> "The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages."

In the case of Whitlow v. Nashville, Chattanooga & St. Louis Railroad Company, 68 L. R. A., pp. 503-509, the Supreme Court of Tennessee dealt with a case for the recovery of damages for death occurring on the defendant's railroad in Alabama. The defendant contended that the Alabama statute was penal by reason of leaving the question of amount of recovery to the jury without guide or restraint, and for the further reason that recovery could be had without reference to the deceased leaving kin or evidence of loss of personal service. The

court cites as authority, Huntington v. Attrill, and at pages 506-507 discusses the Alabama cases arising under the statutes and concludes on page 508 as follows:

> "What is here said in the quotation just made is the logical result of all the preceding Alabama cases on the subject, when one goes to the very substance of them disregarding mere formal expressions; and it is impossible, in the face of this decision, to hold that actions under the statute are penal in the international sense.
>
> "The action is not so repugnant to the public policy of our state so that we should, for that reason, decline to entertain it. The bringing and disposition of suits for damages caused by wrongful death is a matter of everyday occurrence in the courts of this state. And as said by Mr. Justice Brewer in Stewart v. Baltimore & O. R. Co., 168 U. S. 445, 449, 42 L. Ed. 537, 539, 18 Sup. Ct. Rep. 105-106: 'A negligent act causing death is, in itself, a tort, and, were it not for the rule founded on the maxim, *actio personalis moritur cum persona*, damages therefore could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the states in more or less conformity to what is known as 'Lord Campbell's Act,' is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the

death. An action to recover damages for a tort is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found. Dennick v. Central R. Co., 103 U. S. 11, 26 L. Ed. 439.

In the case last cited, the court, speaking through Mr. Justice White, quoted with approval the following language from Herrick v. Minneapolis & St. L. R. Co., 31 Minn. 11, 47 L. Rep. 771, 16 N. W. 413, which we also adopt, *viz.*" (Same language as heretofore quoted by Supreme Court of U. S. in Northern Pacific Ry. Co. v. Babcock, *supra.*)

The Supreme Court of the state of New Hampshire in the case entitled Hill v. Boston & N. R. R., 89 Atl. pp. 482-487, had under consideration the Massachusetts statute hereinbefore referred to, except at the time of the decision the Massachusetts statute had been amended so that it provided for a minimum fine of not less than $500 and a maximum fine of not more than $10,000.

The decision of the New Hampshire court in Hill v. Boston *et al.*, after dissenting from the doctrine announced in the cases of Raisor v. Ry. 215 Ill. 47, Matheson v. Ry. Co., 61 Kan. 667, and Dale v. R. R., 57 Kan. 601, at page 487, says:

"It is further argued that the public policy of this state does not sanction such a suit as this. But the case of State v.

> Railroad, *supra,* is positive evidence that a suit of this general character was not opposed to public policy up to 1879, when the statute under which that case was decided was repealed, and an action of tort by the deceased's administrator or executor was authorized for the benefit of the relatives of the deceased. Laws 1879, c. 35. And this is the statutory law at the present time. P. S. v. 191, Secs. 8-13. The fact that our law in many respects is materially different from that of Massachusetts is not of itself sufficient to warrant the conclusion that the court in its discretion ought to dismiss an action upon the latter statute. Rice v. Hosiery Co., 56 N. H. 114. To entertain this suit is not so repugnant to our judicial system or to the interests of our citizens as to be contrary to what is known as the public policy of the state."

The defendant in error at p. 49 of its brief, mistakenly asserts that the New Hampshire decision just quoted accords with the law of that state. The New Hampshire statute is purely compensatory and the error of defendant in error is made apparent by the statute itself from which we quote as follows:

> "Sec. 11. The damages recoverable in any such action shall not exceed seven thousand dollars."
>
> "Sec. 12. If the administrator of the deceased party is plaintiff and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by him in conse-

quence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury and his capacity to earn money, may be considered as elements of damage in connection with other elements allowed by law."

(Chap. 191, Public Statutes of New Hampshire.)

In the case of Morisette v. Canadian Pacific Ry. Co., 56 Atl., 1102, the Supreme Court of Vermont decides that a law of Canada allowing damages for personal injuries dissimilar to the law of Vermont is enforceable in the latter state.

At page 1103, the court said:

"It is further objected that the Canadian law, as alleged, although neither criminal nor penal, is so different from ours that we ought not to administer it. Comity does not require us to take up and enforce the law of a foreign state which is contrary to pure morals, or to abstract justice, or to enforce which would be contrary to our own public policy. The law we are considering is not claimed to be open to either of the first two objections, but is claimed to be open to the third, because it is so different from the law of Vermont. Some states have adopted this view, declining to administer foreign laws unless closely analogous to their own. Mexican National Ry. Co. v. Jackson, 89 Tex. 107, 33 S. W.

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857, 31 L. R. A. 276, 59 Am. St. Rep. 28; Anderson v. M. & St. P. Ry. Co., 37 Wis. 321; Richardson v. N. Y. C. R. Co., 98 Mass. 85. But we believe the sounder opinion is that a court should not, in otherwise proper cases, refuse to adopt and apply the law of a foreign state, however unlike the law of its own, unless it be contrary to pure morals, or abstract justice, or unless the enforcement would be of evil example, and harmful to its own people, and therefore inconsistent with the dignity of the government whose authority is invoked. Judged by that test, the ruling was correct. Herrick v. Minneapolis, etc., Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Higgins v. R. Co., 155 Mass. 180, 29 N. E. 534, 31 Am. St. Rep. 544; Dennick v. R. Co., 103 U. S. 11, 26 L. Ed. 439; McLeod v. R. Co., 58 Vt. 727, 6 Atl. 648; Chicago & E. I. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410."

In the case of Marshall v. Wabash, 46 Fed. 269, Judge Sage rendered an oral opinion from the bench, in which he held that he was not bound by the decisions of the Supreme Court of Missouri to the effect that a similar statute was compensatory, and he further held that it was a penal statute and could be enforced only in the state of its creation, "much for the same reason that criminal statutes have no extraterritorial force." The decision was rendered in April, 1891, nearly two years before the decision of the Supreme Court of the United States in

Huntington v. Attrill, *supra*. It is not in harmony with that case or any of the federal cases in which similar statutes were considered, hereinbefore cited. It is directly contrary to the case of Boston and M. R. R. v. Hurd, 108 Fed. 116, by the Circuit Court of Appeals of the First Circuit, upon a like statute fixing a maximum and minimum recovery in case of the death of a passenger on a railway train. The case seems to us to be wholly without weight as an authority.

The case of Dale v. Atchison, Topeka & Santa Fe R. R. Co., 57 Kan. 601, 47 Pac., 521 (the defendant therein being the defendant in error in the case at bar) does not refer to the case of Huntington v. Attrill or any of the Federal or state cases following that decision. It relies upon an early decision in Kansas as a precedent, and finds the New Mexico statute obnoxious, because "in New Mexico it may be strictly penal for it might happen that the person killed was a burden upon his family, contributing nothing to them," which reasoning might permit the filing of a counterclaim or a cross-complaint by an offending railway company demanding judgment against the widow and orphans of the deceased for services rendered. It is perhaps supererrogation to remark that the result contended by the defendant in error, as announced

in the Dale case, is not based upon the experience and history of the average American family. The case of Matheson, *et al.* v. Kansas City, Ft. S. & M. R. Co. is a Kansas case resting upon the Dale case, and adds nothing to that authority; also it does not mention the case of Huntington v. Attrill or any of the cases built thereon. The case of Raisor v. Chicago & Dalton R. R. Co., 215 Ill. 47, 74 N. E. 69, rests largely upon the cases of Marshall v. Railway, *supra*, Dale v. Atchison, Topeka & S. F. Ry. Co., *supra*, and Matheson v. R. Ry. Co. *supra*. The Raisor case is the only case presented by the defendant in error which mentions the case of Huntington v. Attrill. It approves the criticism of the decision in Huntington v. Attrill by Minor on Conflict of Laws in the following statement:

> "Minor, in his work on Conflict of Laws (page 22, note 3), criticizes much that is said in the opinion, and on page 24 says: 'So far as private international law is concerned it matters not whether that punishment is inflicted through the instrumentality of an ordinary prosecution by the state's officers for a fine, or through the medium of a civil action by the party injured for penal damages. In substance it is an act of punishment. It is punitive in either case.' "
>
> (A. S. R. 106, p. 158.)

The Raisor case entirely disregards the doctrine of Huntington v. Attrill, and may stand as

an authority only if the doctrine of that case is repudiated.

Clay v. Atchison, T. & S. Fe Ry. Co. (Tex.) 228 S. W. 907, is included in the authorities of defendant in error. The decision is based on the report of the Commission of Appeals. Like its companion cases, it fails to mention the case of Huntington v. Attrill, and other cases following that case.

Finally, defendant in error refers to the decision of this Honorable Court in Slater v. Mexican Nat. R. Co., 194 U. S. 120, and quotes a portion of the decision therein. There is no similarity between that case and the case at bar. The decision of the Circuit Court of Texas was reversed by the Circuit Court of Appeals, which latter decision was sustained by this Honorable Court because the Circuit Court awarded a judgment not permitted by the law of Mexico. At pages 128-129 the decision reads as follows:

> "Then by article 319, the obligation to support shall last during the time that the deceased might have lived, calculated by a given life table, but taking the state of his health before the homicide into consideration; but 'the obligation shall cease; 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor children become of age. 4. In any other

case in which, according to law, the deceased, if alive, would not be required to continue the support.' It is unnecessary to set forth the detailed provisions as to support in other parts of the statutes. It is sufficiently obvious from what has been quoted that the decree contemplated by the Mexican law is a decree analogous to a decree for alimony in divorce proceedings—a decree which contemplates periodical payments, and which is subject to modification from time to time, as the circumstances change. See also, Arts. 1376, 1377, of the Code of Civil Procedure, and Penal Code, Bk. 2, Art. 363.

The present action is a suit at common law, and the court has no power to make a decree of this kind contemplated by the Mexican statutes. What the Circuit Court did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong, and was excepted to specifically. But we are of the opinion further that justice to the defendant would not permit the substitution of a lump sum, however estimated, for the periodical payments which the Mexican statute required. The marriage of beneficiaries, the cessation of the absolute necessity for the payments, the arising of other circumstances in which, according to law, the deceased would not have been required to continue the support, all are contingencies the chance of which cannot be estimated by any table of probabilities. It would be going far to give a lump sum in place of an annuity for life, the probable value of which could be fixed by averages based on statistics. But to reduce liability

> conditioned as this was to a lump sum would be to leave the whole matter to a mere guess. We may add that by Art. 225, concerning alimony, the right cannot be renounced, nor can it be subject to compromise between the parties. There seems to be no possibility in Mexico of capitalizing the liability. Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts. Mexican Nat. R. Co. v. Jackson, 89 Tex. 107 etc."

The fact that the Mexico statute giving the right of action was entirely disregarded by the Circuit Court of Texas, sufficiently distinguishes the Slater case from the case at bar where the objection of the defendant in error is that the foreign statute has been given effect. Furthermore, the dissimilarity of the Mexico law was of such a character that no scheme of procedure existed under the law of Texas by which the Mexico law could be given effect.

Defendant in error cites the case of Mo. Pac. v. Ault, #256 U. S. 554 as authority against enforcing the right sued on herein. The opinion clearly indicates that the claim for penal damages therein asserted was denied enforcement because it ran counter to a federal law, to-wit, the "Federal Control Act" which did not permit the sovereign authority of the United

States to be held liable in any manner not consented to therein. It is obvious that the defendant in error can claim no such immunity for itself.

On the return of Mr. Nichols to California after the loss of his wife by reason of her misfortune while a passenger in the care of defendant in error, he found the defendant in error subject to service of process. No question of venue or of the jurisdiction was raised by the defendant in error except as to its right to remove the case to the federal court on the ground of diversity of citizenship. If the contentions we have advanced are sound, the defendant in error, upon the death of plaintiff's wife in the manner found by the district court, forthwith became indebted to the plaintiff in the sum of $5,000.00, and such indebtedness is enforcible in the state of California.

There is a collection of quotations from authorities in the case of Miami Copper Company v. State, 17 Ariz. 179, Ann. Cas. 1916 E. 494, so fully establishing the fact that a statutory penalty is nothing more or less than an ordinary debt that we here present them for consideration. The quotations begin on page 498 of the Ann. Cas. Rep. in Rann v. Green, as follows:

> " * * * Chitty says: 'Debt is a more extensive remedy for the recovery of money

than assumpsit, or covenant; for it lies to recover money due upon legal liabilities, or upon simple contracts express or implied, whether verbal or written, and upon contracts under seal or of record, and on statutes, by a party aggrieved, or by a common informer, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty.' 1 Chitty on Pleadings, 101.

"'Where a statute gives a forfeiture of a sum of money, or penalty, the action of a debt lies, because the statute creates a direct debt and a consequent duty.' 1 Chitty on Pleadings, 104.

"In the Laws of England, edited by the Earl of Halsbury (volume 1, part 7, Forms of Actions—Old Forms of Action), it is said: 'Debt lay to recover definite sum due on records, * * * or by common informers and persons aggrieved under penal statutes, even though the statutes did not expressly give a right of action for the penalty.'

"A liability imposed by statute is no greater than a common-law liability. In either case the duty to discharge it is the same. When, therefore, the statute creates a debt, or gives to the party the right to demand from another a sum of money, the law raises an implied promise to pay it. Chief Baron Comyn says:

"'Debt lies upon every contract, in deed or in law. As if an act of Parliament gives a penalty, and does not say to whom nor by what action it shall be recovered, an action of debt lies upon such statute by the party aggrieved.' Comyn's Digest, title Debt, A, 1.

"'Actions for penalties are civil actions, both in form and in substance, according to Blackstone. The action is founded upon that implied contract which every person enters into with the state to obey the laws.' Smith Thompson, J., in Stearns v. U. S., 2 Paine 301, 311, 22 Fed. Cas. No. 13,341.

" * * * While it is, no doubt, true that the action, being based on a violation of the statute, sounds in tort (Chaffee v. U. S., 18 Wall. 516, 21 U. S. (L. Ed.) 908), yet, as there stated, 'debt lies for a statutory penalty, because the sum demanded is certain.'

"The mode in which penalties shall be enforced, whether at the suit of a private party or at the suit of the public, is a matter of legislative discretion, and where the penalty is given by statute, and there is no specified mode of recovery presented, an action of debt will lie. 30 Cyc. 1344, 1345.

"Generally speaking, it is immaterial whether the obligation arose by contract or by operation of common or statute law, in what manner the obligation was incurred, or by what the obligation was incurred, or by what the obligation is evidenced, if it possesses the essential requisites of a foundation for this action debt will lie. 13 Cyc. 408.

"At the common law, the action of debt is the appropriate action for the recovery of a statutory penalty, upon the ground of an implied promise, which the law annexes to the liability. 18 Am. & Eng. Enc. of Law, 274.

"In U. S. v. Mundell, 1 Hughes 415, 6 Cal. (Va.) 245, 27 Fed. Cas. No. 15,834, Iredell, circuit judge, says:

"'The truth is, it is sometimes necessary to distinguish between actions of debt at common law and actions of debt upon a statute, for particular reasons not applicable to the mode of trial. For instance, it is necessary to show it to be "an action on the statute," because otherwise no cause of action will appear, a penalty in the case not existing at common law, and therefore creating no such contract. But when the cause of action is shown, the principles of common law pervade the whole of the trial.'

"In short, while the statute in question creates a new liability unknown to the common law, when such liability does arise it is then ascertained that there is a debt on a liability created by the statute, and such a case is upon the principles of the common law cognizable at law in an action of debt on the liability thus created."

If the principle announced in the paragraph last above quoted from, to the effect that the common law procedure is sufficient to afford a remedy for the recovery of a statutory liability not existing at common law, the liberal code practice of California ought to accomplish the same result, and certainly a federal court by its own procedure in matters of general law can entertain an action for the recovery of a debt arising under the statute of another state. Otherwise it would be unable to perform its constitutional duty of enforcing the laws of the several states.

Dexter v. Edmans, 89 Fed. 470.

The defendant in error claims that section 377 of the Code of Civil Procedure establishes a different rule of damages than that afforded by section 1820 of the statutes of New Mexico, and that for such reason the plaintiff in error is without a remedy in the state of California. Section 377 C. C. P. is the substitute in the state of California for Lord Campbell's Act. It takes away the common law disability to sue for the death of one caused by the wrongful act of another, designates the person who may maintain the action, and provides that such damages may be given as under all of the circumstances of the case may be just. The codes of California do not pretend to enact laws with reference to the right of property or causes of action arising in other states, and section 377 C. C. P., in providing a measure of damages, has reference to, and could only have reference to, damages given for the death of a person in California caused by the wrongful act of another in that state.

II.

The Right to Question the Enforcement of a Right Under the Law of Another State Is Restricted to the Citizens of the State Where the Action Is Prosecuted.

It appears from the complaint in this action and defendant's petition for the removal of the case from the state court to the federal court

that the defendant, Atchison, Topeka and Santa Fe Railway Company is and at all times has been a citizen of the state of Kansas, its line of railroad extending from the state of California to the city of Chicago, Illinois, and traversing en route the state of New Mexico. The plaintiff is a citizen of the state of California, as was also his wife, at the time they became passengers on defendant's railroad intending to visit the city of Chicago. The death of plaintiff's wife occurring in the state of New Mexico of course deprives plaintiff of the benefit of the law of California providing for recovery in such cases, which defendant in error says conflicts with the law of New Mexico, and for that reason argues that plaintiff was not entitled to any recovery whatever. It may be remarked that the law of New Mexico in question became a part of the contract under and by which the defendant in error undertook to carry plaintiff and his wife to the city of Chicago, and therefore the question of enforcement of contractual obligations arising in different states may have a place for consideration herein. Further reference to this subject will be hereinafter made, but at the present we desire to direct the court's attention to the limitation of the rule that the courts of one state may decline to enforce the laws of another state, and to point out that such

rule is invoked only to avoid the result of injustice to the people of the state where the action may be prosecuted, and to suggest that the corollary to this proposition is that if the non-enforcement of the law of the foreign state will work an injustice to the citizens or a citizen of the state where the action is prosecuted, then it does not lie in the mouth of a defendant to say that the law of the foreign state should not be enforced. First it is important to consider underlying reasons for holding the laws of one state unenforceable in another state. We quote from Minor on Conflict of Laws, section 5, page 9, as follows:

> "There may be said to be five instances wherein it is generally considered that the municipal law of the state where the question is raised (*lex fori*) forbids the enforcement of a foreign law. (1) Where the enforcement of the foreign law would contravene some established and important policy of the state of the forum; (2) where the enforcement of such foreign law would involve injustice and injury to the people of the forum; (3) where such enforcement would contravene the canons of morality established by civilized society; (4) where the foreign law is penal in its nature; and (5) where the question relates to real property." (P. 9.) * * *
>
> "In view of these frequently recurring exceptions, and to avoid lengthy paraphrases, we will in future designate as 'The Proper Law' that law which, upon

general principles, is the proper law to govern the case." (Pp. 9-10.)

It may be noticed that in subdivision 1 reference is made to the contravention of some established and important policy of the state of the forum; in section 2 reference is made to an injustice and injury to the people of the forum, thereby giving emphasis to the fact that it is for the benefit of the state or the people of the state that the policy of non-enforcement of a foreign law must rest upon. Exceptions to the non-enforcement of a foreign law are referred to in section 7, pages 12 and 13 of the same work, as follows:

"This exception, like most of the others, is but a branch of the first, but, by reason of its frequency and importance, is treated separately.

"It is natural, and not at all to be reprobated, that the courts of the forum should refuse to enforce a foreign law, if to do so would result in injustice to their own people. The object of the enforcement of a foreign law in any case is to mete out, as far as possible, exact justice to all concerned, as well as to give due effect to the laws of other states. But the first and most important of these objects fails altogether when the enforcement of the proper law would result in injustice and loss to innocent citizens of the forum. As between the latter and strangers, it is not remarkable that the courts should elect in a close case

> to decide the matter in accordance with the *lex fori*, thus giving their fellow citizens the advantages conferred upon them by the law under which they live and ordinarily transact their business. The observance of comity towards other states cannot reasonably be expected at the expense of injustice to residents of the forum, for whose benefit the courts and the law are primarily instituted. The existence of this exception to the enforcement of the "proper law" is beyond dispute, though its limits are not yet precisely defined."

Again the same author in the same section, pages 16 and 17, says:

> "Another question arises which involves the scope of this exception. Does it apply only to citizens of the forum, or should it be extended to those, not citizens, who are domiciled there, or even to those who are casually present there? As between the states of this Union, if the party upon whom the foreign law operates injuriously is a citizen of the United States, he must be held a citizen of the forum if he is domiciled there. But if he be not domiciled there, or if he be an alien, or if the suit be instituted in a foreign country, the point becomes important."

Within the rules above prescribed, we submit that a judgment in favor of the plaintiff for damages by reason of the loss of his wife, as authorized by the laws of the state of New Mexico, would not contravene any established

and important policy of the state of California; nor would the same result in injustice and loss to innocent citizens of the forum. Neither would the enforcement of such right contravene the canons of morality established by civilized society. On the contrary, it would be in consonance with the policy of the law of California which affords a remedy by civil action for the enforcement and protection of rights and the redress and prevention of wrongs. (Code of Civil Procedure, Sec. 21.) The judgment herein of the Circuit Court of Appeals renders justice to a citizen of California, and, it may also be added, justice to the defendant in error.

The defendant does not come within any of the exceptions as prescribed by the rule last above quoted whereby it may complain against the enforcement of the law in question, for defendant is not only a foreign citizen, but it does not and cannot occupy the position of a natural person who might be domiciled or even casually present in the state of California.

The lack of status enabling defendant to complain against the jurisdiction of a federal court sitting in California to enforce the New Mexico statute is emphasized by the recent case of Held v. District of Columbia, U. S. Supreme Court Advance Opinions, No. 15, of date June 15th, 1922. At page 503 it is said:

"It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him."

III

The Full Faith and Credit Provision of the Constitution of the United States Requires the Enforcement of the New Mexico Statute in the State of California.

This Honorable Court in the recent case entitled, Kenney v. Supreme Lodge of the World Loyal Order of Moose, 252 U. S. pp. 411-416, construes a statute of the state of Illinois which provided that no action should be brought or prosecuted in that state for damages occasioned by death occurring in another state in consequence of wrongful conduct. The Supreme Court of Illinois held that as by the terms of the statute the original action could not have been brought there, the courts of that state had no jurisdiction of a suit upon the judgment obtained in Alabama. This Honorable Court reversed the case and at page 416 said:

"Some argument was based upon the fact that the statute of Alabama allowed an action to be maintained in a court of com-

petent jurisdiction within the state, 'and not elsewhere.' But when the cause of action is created, the invalidity of attempts to limit the jurisdiction of other states to enforce it has been established by the decisions of this court. Tennessee Coal, I. & R. Co. v. Georgia, 233 U. S. 354, 58 L. ed. 997, L. R. A. 1916D, 685, 34 Sup. Ct. Rep. 587; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; and had these decisions been otherwise, (416) they would not have imported that a judgment rendered exactly as required by the Alabama statute was not to have the respect due to other judgments of a sister state.

As the judgment below upheld a statute that was invalid as construed, the writ of error was the proper proceeding, and the writ of certiorari must be dismissed. 252 U. S. p. 416."

As we read the decision of this Honorable Court in the Kenney case we understand the principle established thereby to be that where a cause of action is created in one state the party to whom it belongs is entitled to enforce it in any other state, and we think without regard to the fact whether or not the right of action has passed into a judgment. The contention of the defendant in error in this case is in effect, that the law of California prohibits the prosecution of an action in that state to recover for death which has arisen under the law of another state. No such law exists in Cali-

fornia and if the Supreme Court of that state should hold that the policy of California forbids such action therein, which it has not, such decision would deny to a party plaintiff the protection afforded by article 4, section 1 of the Constitution of the United States.

In the case of Tennessee Coal, Iron & R. R. Co. v. George, 233 U. S. pp. 354-361, this Honorable Court had under consideration a phase of the full faith and credit ~~decision~~ of the Constitution in reference to transitory actions and also took notice of the necessity of prosecuting such actions in a state to which a defendant may have removed after the cause of action arose. At page 359, this Honorable Court said:

> "But that rule has no application to a case arising under the Alabama Code relating to suits for injuries caused by defective machinery. For, whether the statute be treated as prohibiting certain defenses, as removing common-law restrictions, or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action—the right and the remedy are not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal. The cause of action is transitory, and like any other transitory action can be enforced 'in any court of competent jurisdiction within the state of Alabama. * * *' But the owner of the defective machinery causing the in-

jury may have removed from the state, and it would be a deprivation of a fixed right if the plaintiff could not sue the defendant in Alabama because he had left the state, nor sue him where the defendant or his property could be found because the statute did not permit a suit elsewhere than in Alabama. The injured plaintiff may likewise have moved from Alabama, and for that, or other, reason may have found it to his interest to bring suit by attachment or *in personam* in a state other than where the injury was inflicted.

The courts of the sister state, trying the case, would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action, or which name conditions on which the right to sue depend. But venue is no part of the right; and a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action."

233 U. S., pp. 359-360.

The expression "Full faith and credit," as we understand it, means that credit which the state itself gives to the acts when proven. The public acts referred to in article 4, section 1 of the Constitution of the U. S. are the legislative

acts, the enacted laws of the state; their enforcement is guaranteed in the same sentence of the constitutional provision that guarantees the enforcement of judicial proceedings of each state. The command of respect of the *law* of a state is as definite as it is in reference to a judgment of such state, which necessarily must rest upon the law.

If a legal right is guaranteed by the Constitution its enforcement is not to be stayed by any state policy; an act of the Legislature of a state declaring such right unenforceable as being against state policy or otherwise would be void. (Kenney v. Supreme Lodge etc., *supra.*)

Again, if the right is a constitutional one, it does not require the aid nor involve the uncertain application of comity for its enforcement. Such seems to have been the view expressed by Circuit Judge Putnam in a case entitled Conklin v. United States Shipbuilding Co., 123 Fed. 915-916:

> "The rule of so-called comity has little influence with me. The best late writer on international law—Dicey—says very truly: 'The term "comity" as already pointed out, is open to the charge of implying that the judge, when he applies foreign law to a particular case, does so as a matter of caprice or favor.' It is rather a scapegoat, an opportunity of escape for the court. I know of few propositions that now come

> before the courts which are not governed by law, and in this case I must be governed by the law as practiced, and by the precedents, and not by any mere matter of comity."

The Circuit Court of Appeals of the Eighth Circuit in an opinion by Judge Caldwell in the case of Hanna v. State Trust Co., 70 Fed. p. 8, has declared the same principle with reference to legal rights, quoting in the opinion this Honorable Court as authority:

> "The rights of the citizen, lawfully acquired by contract, are under the protection of the Constitution of the United States, and like the absolute rights of the citizen, are not dependent for their existence or continuance upon the discretion of any court whatever. Constitutional rights and obligations are no more dependent on the discretion of the chancellor than they are on the discretion of the Legislature. 'Rights,' says the Supreme Court of the United States, 'under our system of law and procedure, do not rest in the discretionary authority of any officer, judicial or otherwise.'"

In our opinion, the command of the Constitution of the United States that full faith and credit shall be given in each state to the public acts of every other state is equally a command upon the courts of each state to hear and determine causes arising under the laws of any other state.

IV.

The Law of New Mexico Became a Part of the Contract of Carriage Between the Parties Thereto.

It is an elementary principle of law that the law of the state where the contract is to be performed forms a part of every contract. It may therefore be said that the defendant contracted to carry plaintiff and his wife with the expectation and obligation on its part that in case of the death of either in the state of New Mexico recovery would be had in accordance with the laws of that state and it can make no difference to the defendant in what jurisdiction it answers to its obligations imposed by statute and contemplated by its contract.

We have before said that the statute of New Mexico formed a part of the defendant's contract of carriage with the plaintiff and therefore, in that aspect of the case it is governed by those decisions relating to the enforcement of contracts executed in foreign jurisdictions. In any event, a right created by a statute is fully as worthy of enforcement as one created by contract.

The Supreme Court of Wisconsin in the case of International Harvester Co. etc. v. McAdam, 26 L. R. A. (N. S.) pp. 774-781, had under

consideration the obligations of a contract of a married woman made in South Dakota, at the time of the execution of which all the makers were residents of South Dakota. Such contract was legal under the laws of South Dakota but illegal under the laws of Wisconsin. The contract, however, was enforced on the ground that being valid in the place where executed, it should be enforced, although under the laws of Wisconsin such a contract executed in that state would be unenforceable. At page 779, the court says:

> "Many illustrations might be given of instances of contracts made elsewhere, which would not have been valid if made in the state where judicial enforcement was attempted, including instances where the invalidity was referable to statutory prohibitions, being enforced by judicial remedies in the latter jurisdiction. Such as contracts providing for a rate of interest which would be usurious with penalizing consequences, even to the extent of forfeiture of principal and interest as to such a contract, if made in the law of the forum."

Again illustrating the point that the non-enforcement of the law of a foreign jurisdiction is for the benefit of the citizen of the state alone when the action was prosecuted, and holding the promissory note of a married woman executed in the state of Missouri to be enforceable in the state of Louisiana where such contract

would have been void, is the case of Baer Bros. v. Terry, 108 La. 597, 92 A. S. R. 394, 396. At page 395 A. S. R. the court says:

> "Nor do we agree with the counsel's contention that assuming defendant to have been liable on the notes before she came to this state, the law of this state prohibiting wives from binding themselves for the debts of their husbands precludes recovery against her. The law is satisfied and its whole object and purpose is accomplished when Louisiana wives are protected against binding themselves for the debts of their husbands; this protection is not extended to Missouri wives, and if these bind themselves in the state of their domicile for the debts of their husbands, they cannot be permitted to come to this state to be divorced from their obligations. When defendant crossed our borders as an immigrant to our soil the debt was already hers, and it has continued to be such. There is nothing in the atmosphere of Louisiana law and Louisiana jurisprudence to disintegrate, or dissolve, valid obligations; to such it is a healthful and bracing atmosphere."

Likewise, we say here that when the defendant, a citizen of Kansas, appeared in the action at bar, it was subject to all the obligations it had assumed under the law of the state of New Mexico, whether with or without reference to the law of that state forming a part of the contract of carriage with the plaintiff.

V.

Conclusion.

In conclusion, we respectfully submit that the doctrine approved by the cases cited by defendant in error has been restricted to the states where such decisions were rendered. The Federal courts and other state courts in which the question has been presented for decision have established a contrary doctrine.

The Judgment of the Circuit Court of Appeals enforces a substantial right belonging to the plaintiff in error, amply supported by the law of the state where the injury was inflicted upon facts found by the trial court against which no complaint is made, a reversal being asked by defendant in error upon no better ground than its theory that a dissimilarity in the laws of the two states requires the same.

It is indeed a hazardous enterprise for a citizen to exercise his liberty to travel if he shall be required to journey across the continent to enforce his right of action against a common carrier. The request of the defendant in error that this Honorable Court declare for the first time that a state policy exists in California which no California court has yet declared is extraordinary.

For the reasons given, we submit that the judgment of the Circuit Court of Appeals should be affirmed.

November 30, 1923.

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